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## Constitutional Law--Separation of Powers--Control by Judiciary of Compensation of Court Attaches

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## CASE COMMENTS

CONSTITUTIONAL LAW—SEPARATION OF POWERS—CONTROL BY JUDICIARY OF COMPENSATION OF COURT ATTACHES.—Original proceedings by the State, on the relation of the judge and chief probation officer of the Domestic Relations Court of Kanawha County, for a peremptory writ of mandamus requiring the county court to correct the domestic relations court's annual budget by providing specified sums as fixed by the judge, under the authority of W. Va. Acts 1947, c. 172, § 8, as amended, W. Va. Acts 1949, c. 148, W. Va. Acts 1953, c. 188, for salaries of probation officers and medical, clerical and secretarial assistants. *Held*, that the act insofar as it authorized the judge to fix the amounts of such officers' and assistants' salaries within minimum and maximum limits is unconstitutional as vesting a nonjudicial function in the judicial department of the government. *State ex rel. Richardson v. County Court of Kanawha County*, 78 S.E.2d 569 (W. Va. 1953).

The case conforms to a general trend to apply rigidly the separation of powers clause of the constitution, W. VA. CONST. Art. V. An examination briefly and in chronological order of the

principal West Virginia cases relied on for their holdings of unconstitutionality of delegations to the judiciary is, however, interesting. *Hodges v. Public Service Comm'n*, 110 W. Va. 649, 159 S.E. 834 (1931), held unconstitutional an act which authorized a court to determine on appeal from the Public Service Commission to whom licenses to construct dams should be issued; but the opinion recognized that "there is some overlapping of judicial and administrative duties" and that "such encroachments on other departmental powers are undoubtedly proper when incidental to the performance of legitimate judicial functions." *Id.* at 654, 159 S.E. at 836. *State ex rel. Baker v. County Court of Tyler County*, 112 W. Va. 406, 164 S.E. 515 (1932), held unconstitutional an act which gave circuit clerks the right on appeal to determine the salaries of sheriff's deputies but expressly excluded any implication that the case might be authority as to an "act respecting the clerk's allowance" inasmuch as "the circuit judge [is] interested in the proper functioning of his clerk's office." *Id.* at 411, 164 S.E. at 517. *County Court of Raleigh County v. Painter*, 123 W. Va. 415, 15 S.E.2d 396 (1941), held unconstitutional an act which empowered circuit courts on appeal from county courts to fix reasonable compensation for the circuit clerk's deputies and assistants because of a declared belief that "the reasoning" of the *Baker* case was "sound and decisive." *Id.* at 419, 15 S.E.2d at 399. While thus adopting the reasoning of the *Baker* case, it wholly overlooked the distinction intimated by the language of the earlier cases. The express reservation in the *Baker* case indicates awareness of a distinction between those who are not members of the court's family, *e.g.*, personnel of the sheriff's office, and those who constitute the staff of the judicial department under direct supervision by the court. The quoted language from the *Hodges* and the *Baker* cases discloses that they did not compel the result in the *Painter* case.

The principal case cites eight others as authority for the proposition that the functions of government relating to the fixing of salaries of probation officers and other relevant positions are primarily nonjudicial. The cited cases each contain a broad dictum to support the court's position but in a completely different context. Their holdings uniformly are that courts are incompetent to question the fixing of salaries of nonjudicial public officers and employees by the legislature or another nonjudicial governmental authority.

Whether the constitutional separation of powers is expressed in a special clause or derived from the framework of the instrument, the fixing of salaries of public officers in general is not so inherently legislative that it cannot be delegated. See *Arnett v. State*, 168 Ind. 180, 80 N.E. 153 (1907). It is doubtful that the West Virginia court would condemn delegation to an authority deemed appropriate; cf. *Lepage v. Bailey*, 114 W. Va. 25, 170 S.E. 457 (1933), sustaining an act empowering the governor to limit activities of any state agency when financial affairs of state government demanded. Acts requiring the judiciary to fix the salaries of its own officers and employees have been held not to vest nonjudicial function in the judiciary, nor to delegate a legislative function, under constitutions with separation of powers clauses as precise as West Virginia's. *Mullhalen v. Riley*, 211 Cal. 29, 293 Pac. 69 (1930); *Winston v. Stone*, 102 Ky. 423, 43 S.W. 397 (1897); *Rockwell v. Fillmore*, 47 Minn. 219, 49 N.W. 690 (1891). *Contra: Henderson County v. Wallace*, 173 Tenn. 184, 116 S.W.2d 1003 (1938). The same result obtains in other states whose constitutions contain no express separation of powers clauses but where a like division is judicially implied from the framework of the instruments. *State ex rel. Gordon v. Zangerle*, 236 Ohio St. 371, 26 N.E.2d 190 (1940); *Rosenthal v. McGoldrick*, 280 N.Y. 11, 19 N.E.2d 660 (1939); *In re Appointment of Revisor*, 141 Wis. 592, 124 N.W. 670 (1910). The *Zangerle* case is particularly interesting because there existed a provision that "the General Assembly, in cases not provided for in this constitution, shall fix the term of office and compensation of all officers. . ." OHIO CONST. Art. II, § 20. Despite this, the court sustained an act authorizing the fixing of salaries of probation officers by the judiciary by resort to the familiar distinction between state "officers" and "employees" and by assigning "probation officers" to the latter category.

The cases have generally arisen under statutes providing both for the court to appoint its own officers and employees and to fix their salaries, with the challenge directed at the appointment power and salary control being treated as incidental to that primary consideration. That a court may properly be given power to provide for the doing of administrative acts necessary and proper to perform satisfactorily its purely judicial duties, and specifically under legislative authorization to appoint a necessary and proper judicial staff for those purposes, is well settled and sustained by cases from states whose constitutions have express separation of powers clauses. *Fox v. McDonald*, 101 Ala. 51, 13 So. 416 (1893); *People v. Lee*.

72 Colo. 598, 213 Pac. 583 (1923); *Russell v. Coaley*, 69 Ga. 215 (1882); *Terra Haute v. Evansville*, 149 Ill. 174, 46 N.E. 77 (1897); *Ross v. Freeholders*, 69 N.J.L. 291, 55 Atl. 310 (1903); *State v. Manlowe*, 33 Tex. 799 (1870-71); *State ex rel. Hall v. County Court of Monongalia County*, 82 W. Va. 564, 96 S.E. 966 (1918). In *State ex rel. Hall v. County Court of Monongalia County*, *supra*, the statute sustained authorized circuit judges to appoint probation officers and fix their salaries and was challenged as to the former power. It would seem that the appointment power would embrace the collateral determination of compensation. The court in the *Hall* case, it is submitted soundly, analogized probation officers to "attorneys at law, masters in chancery, commissioners to sell and convey real estate, receivers of property in *custodia legis* and referees in bankruptcy," in contrast to "sheriffs and other like officers," characterizing the former as "officers or assistants of the court, and not state, county or municipal officers within the meaning of Art. IV of the Constitution." *Id.* at 571-572, 96 S.E. at 969.

Preoccupation with the word "nonjudicial," it is submitted betrayed the court in the principal case into undue reliance on a "tyranny of labels." See Davis, *Judicial Review of Administrative Action in West Virginia—a Study in Separation of Powers*, 44 W. VA. L.Q. 270 (1938). While there may be functions unequivocally "judicial" and others as essentially "nonjudicial," if there is to remain any "area of interaction," see *Hodges v. Public Service Comm'n*, *supra* at 654, 159 S.E. at 836, in which the judiciary may operate in such a manner as to be not repugnant to the separation of powers clause and in such a manner as to lend itself to the practical considerations of the government, see *Chapman v. The Huntington, W. Va., Housing Authority*, 121 W. Va. 319, 336, 3 S.E.2d 502, 510 (1939), it would seem there must remain other functions neither purely judicial nor exclusively nonjudicial. Fixing the salaries of the court's officers and employees might more appropriately be placed in this category. The rule that the judiciary may not be charged with administrative functions does not apply when such functions are reasonably incidental to the fulfillment of judicial duties. See *Hodges v. Public Service Comm'n*, *supra* at 654, 159 S.E. at 836. Determination of the compensation of the court's officers and employees is an administrative function incidental to performance of judicial duties which may be entrusted to the court. *Rosenthal v. McGoldrick*, *supra* at 14, 19 N.E.2d at 661. Furthermore, from the nature of the positions to be filled under the act involved in the principal case and the services to be

rendered, it is apparent that the judge of the Domestic Relations Court of Kanawha County would be peculiarly well qualified to determine what would be the just and proper salaries of the probation officer and the other appointees.

W. R. B., II.

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CRIMINAL LAW—PRINCIPAL IN SECOND DEGREE—CONVICTION OF ATTEMPT.—*D* was indicted jointly with another for forcible rape. He was convicted of an attempt to commit rape, although the evidence showed that he was guilty as a principal in the second degree, if guilty of any crime. *Held*, reversing the lower court and ordering a new trial, that the verdict was contrary to the evidence, because one of the elements of an attempt, an ineffectual act taken toward the completion of the crime, was not proved. Two judges dissented. *State v. Franklin*, 79 S.E.2d 692 (W. Va. 1953).

The question whether one indicted as a principal may be convicted of an attempt when the proof shows only guilt as a principal in the second degree had never been specifically answered in this jurisdiction. At common law it was not necessary to distinguish between principals in the indictment. *Adkins v. State*, 187 Ga. 519, 1 S.E.2d 420 (1939). Accordingly, it has been the practice in this jurisdiction not to specify the principal's degree either in the indictment or the verdict. *State v. Wamsley*, 109 W. Va. 570, 156 S.E. 75 (1930). As a general principle the defendant may be convicted of a lesser included offense when the charge and proof sustain a higher crime. *State v. Prater*, 52 W. Va. 132, 43 S.E. 230 (1902); *State v. Collins*, 108 W. Va. 98, 150 S.E. 369 (1929); *Moore v. Lowe*, 116 W. Va. 165, 180 S.E. 1 (1935). W. VA. CODE c. 62, art. 3, § 18 (Michie, 1949) specifically authorizes a conviction for an attempt upon an indictment for a felony. Thus, it would seem that the instant case is drawing a narrow distinction in holding that a principal in the second degree may not be convicted of an attempt. The principal offender may be convicted of the attempt, see *State v. Collins*, *supra*, even though the proof shows the completed crime, because in legal theory the attempt is included in the consummated crime.

The holdings of the cases cited above indicate an effort to bring our law into conformity with other jurisdictions wherein the distinctions between principals and accessories before the fact have been abolished for all purposes. *People v. Ah Gee*, 37 Cal. App. 1.